No. 14748

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CARL HARVEY JACKINS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

APPELLANT'S REPLY BRIEF

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Reply to Appellee's Preliminary Statement

The questions in this case are involved, some dealing with matters on which there is little law. Appellant's whole life is affected by this appeal from a criminal conviction. Therefore, it is Appellant's opinion that he has not violated Rule 18(c) (d) and (e) of this Court.

I.

Appellee (Br. 16) concedes that Counts II and VIII should be dismissed.

Thus the appeal now concerns Counts I, IX and X.

II.

Count I concerns appellant's employment record since 1935. Appellant (Br. 45-48; 59-61) shows that Count I is within the privilege against self-incrimination.

III.

This then leaves Counts IX and X.

Appellee's Brief: Page 5—Setting.

Appellant shows nineteen questions and statements by the committee (Br. 18-21) and did not pull a "question out of context" (Appellee's Br. 5). These were set forth not to impugn the motives of the Committee but to show the hostility and unfairness of the hearing and its atmosphere. Similarly, the presence of the radio, T.V., and newsreel cameras was set forth to show the unfairness of being exposed thereto without an opportunity to have equal time to make clarifying statements to accusations and unfair references made by the Committee. Thus the importance of *U. S. vs. Kleinman* 107 F. Supp. 407 (DC DC) was that the refusal of the defendant to testify was justified because of the circumstances of the hearing. Furthermore, appellant

does not object to the apparatus per se but rather to being exposed thereto without his consent and without equal opportunity to use said media.

> ". . . Of very great importance, I believe, is a rule protecting the witness from having to submit to broadcasting, television, newsreel cameras, or any other form of recording or reproduction, except the ordinary stenographic transcript. Even flashing flash bulbs can be an indignity and a source of strain to a witness. It is high time that we recognized and accepted the fact that legislative investigations are not a part of show business. Witnesses should not be required to testify in order to provide a spectacle for the public. Requiring testimony under such conditions is not compatible with any sound notion of due process of law, and I would expect our courts, as some have already done, to uphold a witness who refuses to testify for broadcast of any sort. We even have had Congressional investigations put on with sponsors with advertising during the intervals. Can anyone possibly defend such a practice?" Erwin N. Griswold, "The 5th Amendment Today," Pages 47-48.

Appellee's Brief: Page 7—Due Process.

Appellee fails to distinquish charges from an opportunity to answer questions. It is not fitting for appellee to argue that appellant should have answered all the questions propounded in order to maintain his "liberty." The law recognizes the opportunity not to answer questions within the privilege against self-incrimination. For e.g. the trick questions involving espionage (Appellant's Br. 20) such as "You mean you won't even answer the question whether or not you

have engaged in any espionage activities? Is that correct?" (R 98) and again, "Would a true answer to the question as to whether or not you ever engaged in espionage (activities) tend to incriminate you?" (R 99) These are the kind of questions that can not be answered with a "yes" or a "no". And yet the record of the hearing is filled with similar examples (Appellant's Br. 18-21).

Appellee confuses consultation with an attorney with representation by an "effective" attorney (Appellee's Br. 7). See Appellant's brief, Appendix "B", page f, the last several lines, where the Committee at the same hearing in which appellant was involved stated "Mr. Counsel, if necessary, we will have you escorted from the room if you do not desist." Appellant's brief sets forth the considerable concern by noted scholars over the lack of "effective" counsel at these hearings. See Appellant's brief, Appendix "F."

> ". . . In many committees now, the right to counsel is formally recognized. But counsel, though present, is restricted to giving advice when called upon. He cannot address the committee; and counsel who have sought to do so have been ejected from hearing rooms. The right should be a right to effective counsel, and not the mere shadow of that right that has been recently allowed," Griswold, supra, Page 47.

IV.

Appellee's Brief: Page 8—Waiver.

It is impossible to understand appellee's argument on waiver as affecting Counts VIII, IX and X, because appellee will not meet the point made in appellant's brief that it is impossible to consider these Counts unless one considers Count VII. These Counts are all related in context. An examination of the record (R 5; 108-109) shows that dismissed Count VII "Is this (work of personal counseling) something originated by the Communist Party as part of its program?" follows a previous question "May I ask you what do you mean by 'we'? Is this something originated by the Communist Party as part of its program?" and another question followed concerning the Communist Party; then immediately followed Count VIII, "Who are the other people then when you use that word 'we' that are associated with you in this movement?" Then follows another question ". . . are those that you associate with persons that have been identified in this proceeding as members of the Communist Party?" Then another question about membership in any organization whose purpose is the overthrow of the Government through the use of force and violence. Then continuing the context associated with Count VII, the Committee asked again for the names of the persons "you are associated with in this activity that you have described." Appellant is then assured (R 111) by Mr. Doyle that he has waived his privilege and a discussion ensued between appellant and Mr. Doyle on whether or not appellant

has been trapped and appellant is assured again that there is no way in which he can incriminate himself by answering Mr. Doyle's question "But what is the name of the group" which constitutes Count IX. Finally Mr. Doyle concludes with the question which constitutes Count X "Does the group you refer to have an office with you in that same office?" There can be no doubt but that the questions in Counts IX and X are related in context with dismissed Count VII.

Appellee goes so far as to say that appellant should have answered that his profession was one of "earning money" (Br. 10) instead of having given the full answer which appellant did give (R 108). Appellee overlooks that appellant's full answer contained no incriminating matter and he therefore had the right to "stop short." Appellee does not meet the issue of stopping short.

Appellee's Brief: Page 10—Tend to Incriminate.

Appellee quarrels with the use of the word "variance" because appellant suggested the possibility of being exposed to perjury if appellant's testimony was at variance with the testimony of others. Appellee says appellant does not suggest one instance in the entire record where "there is or may be a variance." The point is precisely that appellant declined to answer because of apprehension of variance and ensuing possibility of perjury so that of course the record does

not show the variance. We refer to Appellant's Brief page 47-48 on counsel for the Committee's invitation to such difficulties. *U. S. vs. Moran* 194 F 2nd 623 (CA 2 1952) cited by appellee for a different purpose, was an appeal from a perjury conviction arising out of testimony before a Senate Crime Investigating Committee.

Appellee's Brief: Page 13—Pertinency of Questions.

Although in *Bowers vs. United States*, 202 F. 2nd 447 (CA DC) the defendant was acquitted because the United States had not sustained the burden of proof in establishing the pertinency of a question which the witness had declined to answer, appellee cites the case as stating that if the context of the question is plainly pertinent, then the burden is ipso facto satisfied. But the Court also stated: ". . . the question and answer for which it called, standing alone, did not pertain to the subject under inquiry . . ."

As to Counts VIII, IX and X, appellee (Br. 15) cites Mr. Tavenner as stating "the purpose was of ascertaining facts relating to the man's identity and the business in which he was then engaged." However, the Committee had earlier in the hearings (R 83-84, 87, 108) received the answers to satisfy said purpose; but the Committee (Appellant's Br. 24-30, 54-56) continued to reword questions to further harrass and entrap the appellant into waiver.

> ". . . It may often be proper, justifiable and helpful in the accomplishment of its investigative purposes for a Congressional Committee to address to witnesses questions which it can not demonstrate to be pertinent. But in branding a refusal to answer as a misdemeanor, Congress was careful to provide that the question must be 'pertinent to the question under inquiry'. It follows that when a witness refuses to answer a question and the Government undertakes to convict him of a criminal offense for not answering, the pertinency must be established. A presumption of pertinency will not suffice." *Bowers vs. U.S.,* supra, Page 448.

U. S. vs. Orman 207 F. 2nd 148 (CA 3), is cited by appellee (Br. 16). This case, however, held that an offer during the trial to show that the answer would have been innocent did not destroy the pertinency of the question. Appellant does not quarrel with this holding. Rather the point is that the questions represented by Counts IX and X are not anywhere shown to be pertinent, although in context they could be incriminating to answer, leading back as they did, to Count VII, and other interspersed questions on communism. (See this brief, pages 5, 6) In addition and differing from the *Orman* case the Committee already had the answers in its record (Appellant's Br. 66).

Appellee cites (Br. 16) *United States vs. Josephson,* 165 F. 2d 82 (CA 2) (1948), which appellant does not feel is applicable because in that case the defendant refused to even be sworn and to testify, claiming that his rights under the First Amendment were being vio-

lated; under those particular facts the Court held that the authorizing statute contains the declaration of Congress that the information sought was for a legislative purpose. In the instant case appellant testified freely as to a great many matters and the trial court held that appellant intended to cooperate as fully as he could (R 192).

Appellee does not distinguish between stating the general purpose of the investigation, which appellant concedes, from the matter of the pertinency of particular questions asked or the answers sought.

Appellee's brief avoids discussion of the basic general points in Specification of Error No. 1, argued in appellant's brief, page 16. These points (unfair hearing; lack of due process) are crucial to the protection of appellant from the unconstitutional acts on the part of this Legislative Committee and should be thoroughly considered by the court.

Respectfully submitted,

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Attorney for Appellant